Supreme Court, U.S.
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No. 03-883

In the Supreme Court of the United States

WOLGAST CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, a general contractor, committed an unfair labor practice by interfering with a union official's access to a common construction site in which petitioner had a property interest, when the union was the bargaining representative of the employees of a subcontractor hired by petitioner to perform work on the site, the subcontractor's labor agreement contained a union access provision, and the union official sought access to perform representational duties on behalf of employees represented by the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 349 F.3d 250. The decision and order of the National Labor Relations Board (Pet. App. 16a-20a) and the decision of the administrative law judge (Pet. App. 25a-69a) are reported at 334 N.L.R.B. 203.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2003. The petition for a writ of certiorari was filed on December 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees, *inter alia*, the right "to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing." Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7. In *CDK Contracting Co.*, 308 N.L.R.B. 1117 (1992), the National Labor Relations Board (Board) applied those statutory provisions to the construction industry and exercised its authority to "resolve conflicts between [Section] 7 rights and private property rights." *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976). The Board concluded that a general contractor violates Section 8(a)(1) by denying a union official access to a common construction site in which the general contractor has a property interest, when the union represents employees of a subcontractor hired by the general contractor to perform work on the site, the subcontractor's labor agreement contains a union-access provision, and the union official seeks to perform representational duties on behalf of employees represented by the union. See 308 N.L.R.B. at 1121-1122. In that situation, the Board concluded that the general contractor must permit the subcontractor "to observe [its] contractual obligations." *Id.* at 1117.

The *CDK Contracting* Board further concluded that its holding in that case is consistent with this Court's decision in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992). See 308 N.L.R.B. at 1117. In *Lechmere*, this Court reaffirmed the general rule that a property owner may validly post its property against the distribution of union literature by nonemployee union organizers, but also reaffirmed the Board's authority to grant nonemployee union organizers access to private property where the union lacks "reasonable

alternative means" of communicating with the employees (*i.e.*, where the employees are "inaccessible"). 502 U.S. at 537-538 (applying *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Among other considerations, the *CDK Contracting* Board explained that there are generally no "reasonable, effective alternative means" by which a union can enforce the terms of its collective-bargaining agreement with the subcontractor, absent access to the common jobsite. 308 N.L.R.B. at 1117.

2. Petitioner is a non-union general contractor in the construction industry. Pet. App. 4a, 17a, 27a, 28a. Petitioner hires union and non-union subcontractors to perform construction work. *Id.* at 4a. In 1999, petitioner was retained by Cinema Hollywood, LLC, to construct an addition to a movie complex in Birch Run, Michigan. *Id.* at 4a, 27a, 28a, 62a. Petitioner hired ten subcontractors to perform work on this construction project, including Acoustical Arts, Inc. (Acoustical), a unionized firm. *Id.* at 4a, 17a, 27a, 28a. Acoustical's carpenters were represented by Local 706 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union). *Id.* at 4a, 17a, 29a. A term in the collective-bargaining agreement between the Union and Acoustical permitted Union representatives "access to all jobs" and "to visit the job during working hours to interview the employer, steward, or men at work," provided that the representatives "[do] not hinder the progress of the work." *Id.* at 4a-5a; see *id.* at 17a-18a, 28a. On October 13, 1999, Leon Turnwald, a Union business representative, went to the Cinema Hollywood jobsite to see how Ray Cotton, a new Acoustical employee (and Union member) was "getting along." Pet. App. 5a, 30a. An Acoustical foreman advised Turnwald that Cotton had reported for work that day, but had left the site prior to Turnwald's arrival. *Id.* at 30a, 50a n.2; see *id.* at 5a. Turnwald encountered Brian Grandy, petitioner's project superintendent, who told him to "get your business done and get out," and Turnwald left. *Id.* at

31a-32a; see *id.* at 5a. Later that day, Turnwald spoke to Cotton by telephone. Cotton told Turnwald that he had left the site because the scaffolding on which he was required to work was unsafe. *Id.* at 32a; see *id.* at 5a. Turnwald then spoke with Acoustical's owner, who told Turnwald that the scaffolding was safe. *Id.* at 5a, 32a. The following day, October 14, 1999, Turnwald returned to the jobsite to investigate the safety of the scaffolding in response to Cotton's complaint. *Id. at* 5a, 17a, 32a. Turnwald, however, was confronted by Grandy, who ordered him off the site in loud and profane terms. *Id.* at 5a, 17a, 32a-33a. Grandy also overturned a makeshift table on which a new Acoustical employee was attempting to fill out union paperwork, causing a set of tools to fall on Turnwald. *Id.* at 5a-6a, 36a-40a, 42a-44a. At that point, Turnwald left the site without checking the safety of the scaffolding. *Id.* at 6a[1].

3. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), on October 14, 1999, by interfering with the Union's effort to access the Cinema Hollywood jobsite pursuant to its collective-bargaining agreement with Acoustical. Pet. App. 25a-26a.

a. After a hearing, an administrative law judge (ALJ) sustained that allegation. Pet. App. 63a-65a. The ALJ concluded that the Board's decision in *CDK Contracting Co.*

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[1] Kevin Culbert was the new Acoustical employee who was attempting to fill out union paperwork on the makeshift table that Grandy overtuned. Culbert was represented by a different Carpenters local, and an official of that union, Robert Horner, accompanied Turnwald to the Cinema Hollywood site on October 14, 1999, to collect Culbert's paperwork. Pet. App. 18a n.3, 29a, 30a, 32a; see *id.* at 5a-6a, 50a, 52a, 55a. The Board found that petitioner, through Grandy, did not unlawfully interfere with "Horner's access to employees he represented," *i.e.*, Culbert, because there was "insufficient evidence" that, on October 14, 1999, a contractual union access provision was in effect between Culbert's union and Acoustical. *Id.* at 18a n.3.

"controls this case." *Id.* at 63a. Applying *CDK Contracting*, the ALJ concluded that petitioner violated Section 8(a)(1) on October 14 when Grandy "refused and otherwise interfered with" Turnwald's effort to access the Cinema Hollywood jobsite. *Id.* at 65a; see *id.* at 64a. The ALJ noted that petitioner was entitled to "impose reasonable rules" on union representatives seeking access to the jobsite, *id.* at 64a, but found that Grandy had not advised Turnwald of any such rules. *Id.* at 61a. The ALJ also found that Turnwald had not "hinder[ed] the progress of the work" during his visit. *Id.* at 64a.

b. The Board, in agreement with the ALJ, concluded that *CDK Contracting* "is controlling in this case" and that petitioner violated Section 8(a)(1) by interfering with Turnwald's access to the Cinema Hollywood jobsite "pursuant to the access provision in the Union's collective-bargaining agreement with [Acoustical]." Pet. App. 18a; see *id.* at 19a. In so concluding, the Board emphasized that the purpose of Turnwald's visit to the site on October 14 was "to investigate a safety complaint lodged by a union member who worked on the jobsite the day before," *i.e.*, Acoustical employee Cotton's complaint. *Id.* at 19a. The Board also found no merit to petitioner's contention that *CDK Construction* "conflict[s] with" *Lechmere*. *Id.* at 18a.

As a remedy, the Board ordered petitioner to permit the Union "to enter the Cinema Hollywood jobsite or any other jobsite for the purposes of representing the employees of [Acoustical] under its collective-bargaining agreement with the Union," with a proviso that petitioner "is not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access." Pet. App. 20a.

4. The court of appeals enforced the Board's order. Pet. App. 4a, 15a. Stressing the "reality inherent in construction work that a construction subcontractor's employees work on the property of another," the court concluded that, "[u]nder the circumstances presented here, the Board's balancing of

the conflicting interests in *CDK Contracting* is a reasonably defensible interpretation of the [NLRA]." *Id.* at 13a-14a. In so concluding, the court found that *Lechmere* is "readily distinguishable from this case." *Id.* at 13a.

The court explained that, unlike in *Lechmere*, "the union agent at issue here [*i.e.*, Turnwald] did not seek access for purposes of organizing employees * * * or other similar activity in exercise of the union's 'derivative' [Section] 7 rights." Pet. App. 13a. Rather, the court explained that Turnwald sought access to the Cinema Hollywood jobsite "as the direct representative of the subcontractor's [*i.e.*, Acoustical's] employees under the authority of the collective bargaining agreement," in which the employees had secured the benefit of "union access for purposes of investigating the premises and interviewing employees on-site." *Ibid.*

The court also rejected petitioner's contention that the *CDK Contracting* Board impermissibly held that "a general contractor is 'bound' to a contract term to which it is not a party," *i.e.*, to the access provision in the subcontractor's agreement with the union. Pet. App. 14a. Rather, the court explained, *CDK Contracting* held only that a general contractor may not invoke its property interest to interfere with "the duties of the union as representative of the subcontractor's employees." *Ibid.* The court also found sufficient evidentiary support for the Board's finding that petitioner had not conveyed any "rules for visiting the jobsite" to Turnwald. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. As this Court has explained, in a case such as this one, "the task of the Board * * * is to resolve conflicts between [Section] 7 rights and private property rights, 'and to seek a proper accommodation between the two.'" *Hudgens* v.

NLRB, 424 U.S. 507, 521 (1976) (quoting *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 543 (1972)). In such cases, the Board's "basic objective" is to fashion an "accommodation of [Section] 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.'" *Hudgens*, 424 U.S. at 522 (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Moreover, "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." *Hudgens*, 424 U.S. at 522. Because the Board's accommodation of the competing interests in the "generic situation" presented by *CDK Contracting* is reasonable, the court of appeals in this case properly afforded deference to the Board's position. Pet. App. 13a-15a; see *Hudgens*, 424 U.S. at 522-523.[2]

On the one hand, NLRA Section 7 affords protection to employees in their "invocation of a right rooted in a collective-bargaining agreement"—such as a union access provision—because invoking a contractual right is "unquestionably an integral part of the process that gave rise to the agreement." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984). Moreover, NLRA Section 8(a)(1) affords employees of a particular employer protection from another employer's interference with their Section 7 rights. See *Hudgens*, 424 U.S. at 510 n.3. Employees of a subcontractor therefore have a legitimate interest in being protected from the general contractor's imposition of "extra-contractual restraints" that might operate to "nullify[]" important pro-

[2] The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957). Deference to the Board is particularly warranted "where Congress likely intended an understanding of labor relations to guide the [NLRA's] application." *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995).

visions of their collective-bargaining agreement. *CDK Contracting*, 308 N.L.R.B. at 1122 (quoting *Villa Avila*, 253 N.L.R.B. 76, 81 (1980), enforced as modified, 673 F.2d 281 (9th Cir. 1982)).

On the other hand, the general contractor has a legitimate interest in "control[ling] its property" and may not wish "to admit the union agent onto the property." *CDK Contracting*, 308 N.L.R.B. at 1121. Also, the general contractor has not agreed to the access provision in the subcontractor's labor contract and does not have a bargaining relationship with the union. Cf., *e.g.*, *NLRB* v. *American Nat'l Can Co.*, 924 F.2d 518, 524-525 (4th Cir. 1991) (finding that an employer with a labor agreement was required to allow the union access to its plant because access was necessary to ensure the union's responsible representation of employees with respect to a grievance).

The Board reasonably accommodated the competing interests by concluding that, on balance, the general contractor must permit the subcontractor "to observe [its] contractual obligations." *CDK Contracting*, 308 N.L.R.B. at 1117. First, the Board has determined that there are generally no "reasonable, effective alternative means" by which a union can enforce the terms of its collective-bargaining agreement with the subcontractor, absent access to the common jobsite. *Ibid.* In analogous circumstances, this Court has upheld the Board's authority to grant access to union agents who are not employees of the property owner. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537 (1992) (Board may grant nonemployee union organizers access to private property where the union lacks "reasonable alternative means" of communicating with the employees, *i.e.*, where the employees are "inaccessible").

Second, in a case such as this one, the general contractor itself has made an affirmative business decision to hire a unionized subcontractor, rather than a non-union firm, to perform necessary construction work on the common jobsite.

That decision reflects the general contractor's economic determination that hiring a unionized firm will best achieve a successful and timely completion of the overall project. See *Villa Avila*, 253 N.L.R.B. at 81 (noting the responsibility of general contractors for assuring that "the entire * * * project * * * progresses according to a predetermined and customarily exacting schedule"). Where the general contractor has determined that hiring a unionized sub-contractor will best serve its objectives, the general contractor is ill-positioned to claim an unfettered right to deny entry to union representatives, whose periodic visits to the jobsite are an aspect of the manner and means by which the subcontractor accomplishes its work. Accordingly, the Board, balancing the conflicting interests, reasonably regards the general contractor as having "voluntarily" elected to "subject[]" its property rights to the access provision in the subcontractor's agreement with the union. *CDK Contracting*, 308 N.L.R.B. at 1117.

Third, the Board has found that the general contractor's legitimate property interests are "effectively" addressed by "common and accepted practice[s] obtaining at construction sites" with respect to access. *Villa Avila*, 253 N.L.R.B. at 81. Those practices include requirements that the union representative notify the general contractor of his presence on the site and state the nature of his visit. *Id.* at 80. The availability of such common industry practices, and of other means by which the general contractor may protect its property interests,[3] further support the Board's striking the balance

[3] For example, the general contractor may deny a union representative entry to the site if his prior conduct "reveal[s] that the stated purpose [of the visit] is pretextual," and may evict the representative if, having been permitted entry, the representative engages in improper conduct. *Villa Avila*, 253 N.L.R.B. at 80. See *CDK Contracting*, 308 N.L.R.B. at 1117 n.1 (permitting general contractor to promulgate a reasonable escort requirement).

in favor of allowing the subcontractor to honor its contractual access obligation.

2. a. In this Court, petitioner does not directly contend that the Board's accommodation of the competing interests in *CDK Contracting* is unreasonable. Rather, petitioner's primary contention (Pet. i (Question 1), 6-8, 13-14) is that the Board's accommodation of the competing interests is foreclosed by this Court's decision in *Lechmere, Inc.*, *supra*. Petitioner is mistaken.

As already discussed, see pp. 2-3, 8-9, *supra*, *Lechmere* upheld the Board's authority to grant nonemployee union organizers access to private property where the union lacks "reasonable alternative means" of communicating with the employees (*i.e.*, where they are "inaccessible"). 502 U.S. at 537. Analogously, it is permissible for the Board to give effect to the subcontractor's contractual access provision in a *CDK Contracting* scenario, where there are generally no "reasonable, effective alternative means" by which a union can enforce the terms of its collective-bargaining agreement with the subcontractor. 308 N.L.R.B. at 1117. Petitioner does not challenge that particular determination by the Board, nor could it. See *NLRB* v. *Villa Avila*, 673 F.2d 281, 283 (9th Cir. 1982) (explaining that the subcontractor's "[c]ompliance with many contract provisions can be effectively policed only on the premises where the [union] agent may observe conditions during working hours").

Even apart from the question of reasonable alternative means, there is no merit to petitioner's contention (Pet. 8, 13) that *CDK Contracting* is foreclosed by the "bright line rule" of *Lechmere* that a property owner may validly post its property against the distribution of union literature by nonemployee union organizers. 502 U.S. at 538. As the Court explained, there is a "critical distinction" between "the organizing activities of employees (to whom [Section] 7 guarantees the right to self-organization) and nonemployees (to whom [Section] 7 applies only derivatively)." *Id.* at 533.

That "critical distinction" is germane here. In a *CDK Contracting* scenario, union officials do not seek access to the common jobsite to engage in "derivative" Section 7 activity (such as organizing), but rather, to carry out their non-derivative statutory duties as the exclusive bargaining representative of the subcontractor's employees (see 29 U.S.C. 158(a)(5)). More fundamentally, giving effect to the contractual access provision furthers the employees' non-derivative Section 7 right to enjoy the benefits negotiated in their collective-bargaining agreement. See Pet. App. 13a; *City Disposal Sys.*, 465 U.S. at 831.

b. Contrary to petitioner's contention (Pet. 7, 8-12), the decision of the court of appeals in this case does not conflict with decisions of the D.C., Third, and Ninth Circuits. None of the cases relied on by petitioner addresses (much less invalidates) the Board's accommodation of the competing interests in *CDK Contracting*, and none of them involved union efforts to enforce employee rights under a collective bargaining agreement. Rather, in each of the cited cases, the court, applying *Lechmere*, concluded that nonemployee union agents were not entitled to access under Section 7 for the purpose of handbilling customers on private property.[4]

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[4] See *United Food & Commercial Workers, Local 880* v. *NLRB*, 74 F.3d 292, 293-294 (D.C. Cir.), cert. denied, 519 U.S. 809 (1996) (cited at Pet. 7, 9) (agreeing with Board that nonemployee union agents may not enter the property of retail stores to picket and distribute literature to potential customers urging them to shop elsewhere; "Under the established case law, it would make no sense to hold that nonemployees have a greater right of access when attempting to communicate with an employer's customers than when attempting to communicate with an employer's [unorganized] employees."); *Metropolitan Dist. Council of Philadelphia & Vicinity United Bhd. of Carpenters* v. *NLRB*, 68 F.3d 71, 74 (3d Cir. 1995) (cited at Pet. 7, 11) (agreeing with Board that non-employee union agents may not enter the property of a condominium development to distribute area-standards handbills to prospective purchasers; "We can conceive of no reason why this policy would be any less compelling in a case in which a union was engaged in area standards

No such consumer-oriented activity is involved here. Moreover, the court of appeals' opinion in this case makes clear that, insofar as handbilling of customers is concerned, the Sixth Circuit is in agreement with the D.C., Third, and Ninth Circuits. See Pet. App. 12a (discussing Sixth Circuit precedent applying *Lechmere* to deny nonemployee union agents access to distribute area-standards and other handbills to customers on store property).[5]

c. The court of appeals' decision does not create a "legal morass" (Pet. 14) for general contractors. For example, although petitioner contends (Pet. 15) that it is "nearly impossible" for construction managers to determine the reason for the union representative's visit to the jobsite, general contractors may require union officials to state the nature of their business. See Pet. App. 20a (Board's order permits petitioner to "apply[] reasonable and non-discriminatory" access rules). Petitioner also contends (Pet. 16) that the union representative may seek access to the site for "dual purpose[s]," one of which is not legitimate (such as to organize unrepresented employees of another employer).

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handbilling than in a case where the union was engaged in direct organizational activity."); *Sparks Nugget, Inc.* v. *NLRB*, 968 F.2d 991, 997-999 (9th Cir. 1992) (cited at Pet. 12) (reversing Board's pre-*Lechmere* grant of access claim for nonemployee union agents to handbill and picket the general public, including potential customers, on hotel property).

[5] Petitioner errs in suggesting (Pet. 10 n.4) that the court of appeals' decision in this case conflicts with *New York New York, LLC* v. *NLRB*, 313 F.3d 585 (D.C. Cir. 2002). In that case, the court did not address the Board's *CDK Contracting* position. Rather, the court remanded to the Board for further consideration a series of questions respecting whether, and to what extent, off-duty employees of an employer that leases space inside a hotel/casino complex have a Section 7 right to distribute organizational literature inside the complex but beyond their employer's leasehold. See *id.* at 590. The court made clear that "[n]o Supreme Court case" (including *Lechmere*) resolves the remanded issues. *Ibid.*

But a representative who engaged in illegitimate conduct on the site would be subject to eviction. See p. 11 note 4, *supra.*

3. Petitioner errs in contending (Pet. 17-18) that the court of appeals' decision "imposes the terms of a subcontractor's union contract on a non-party employer" and therefore conflicts with decisions of this Court (and several courts of appeals) that apply the principle of "privity of contract." As the court of appeals correctly explained (Pet. App. 14a), *CDK Contracting* does not "bind" the general contractor to the subcontractor's labor agreement. Rather, *CDK Contracting* reflects the Board's reasonable judgment that, on balance, the competing interests are best accommodated if —having hired a unionized subcontractor and admitted its workers to the common jobsite to perform necessary work— the general contractor is prohibited from interfering with the subcontractor's obligation to honor the access provision in its employees' labor agreement. The cases cited by petitioner (Pet. 17-18) do not address (much less decide) whether the Board may strike the balance of interests in that fashion.[6]

The court of appeals' decision does not hold petitioner "hostage" to a contractual term about which it was "completely unaware." Pet. 21 & n.9. Petitioner's contention is based on the testimony of Brian Grandy, its project superintendent at the Cinema Hollywood jobsite, to the effect that he had not seen any of the subcontractors' collective-bargaining agreements. See Pet. App. 31a, 78a. It was Grandy's

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[6] Petitioner's reliance (Pet. 17-18) on *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), is misplaced. In *Burns*, the Court held that, although a successor employer is not bound to observe the terms of a collective-bargaining agreement between the union and the predecessor employer (*id.* at 281-282), the successor nonetheless may have a legal duty to recognize and bargain with the union (*id.* at 277-281). Accordingly, to the extent that it is germane, *Burns* lends support to the Board's conclusion in *CDK Contracting* that a general contractor may have a legal duty toward the union and employees it represents (*i.e.*, to refrain from interfering with contractual rights), even though the general contractor is not a party to the union's agreement with the subcontractor.

own profane and confrontational behavior toward Turnwald on October 14, 1999, however, that prevented Grandy from learning that Turnwald was seeking access pursuant to Acoustical's labor agreement for the purpose of investigating the safety of Acoustical's scaffolding in response to an Acoustical employee's complaint. See Pet. App. 5a, 17a, 19a, 32a-33a, 36a-40a, 42a-44a. In any event, Grandy's personal knowledge is not material. Under settled law, a general construction contractor that hires a unionized subcontractor is placed on constructive notice of that subcontractor's union access provision. See *C.E. Wylie Constr. Co.*, 295 N.L.R.B. 1050, 1050 (1989), enforced in part and remanded in part on other grounds, 934 F.2d 234 (9th Cir. 1991); *CDK Contracting*, 308 N.L.R.B. at 1124. Petitioner does not challenge that notice principle.

Finally, there is no merit to petitioner's contention (Pet. 22 n.10) that, because petitioner could have lawfully terminated its subcontract with Acoustical, it was also free to "disregard" the access provision in Acoustical's agreement with the Union. That argument rests on a non sequitur. Under the NLRA, an employer may lawfully cease doing business with another employer "because of the union or nonunion activity of the latter's employees." *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry (Malbaff Landscape Constr.), Local No. 447,* 172 N.L.R.B. 128, 129 (1968). But it does not follow that an employer that continues to do business with another employer is free to prevent the latter from honoring a contractual obligation in its labor agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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